No. SC25895

IN THE SUPREME COURT OF MISSOURI
AT JEFFERSON CITY

STATE OF MISSOURI,

Respondent,

v.

CLIFTON C. REED,

Appellant.

Appeal from the Circuit Court of Butler County, Missouri
36th Judicial Circuit, Division 1
Honorable Mark L. Richardson, Judge

RESPONDENT'S SUBSTITUTE STATEMENT, BRIEF AND ARGUMENT

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JURISDICTIONAL STATEMENT

This appeal is from convictions for six counts of criminal nonsupport, § 568.040, RSMo 2000, obtained in the Circuit Court of Butler County and for which appellant was sentenced, as a prior and persistent offender, to six concurrent terms of five years in the custody of the Department of Corrections. After an opinion by the Missouri Court of Appeals, Southern District, this Court granted transfer pursuant to Supreme Court Rule 83.04. Therefore, jurisdiction lies in this Court. Article V, § 10, Missouri Constitution (as amended 1982).

STATEMENT OF FACTS

Appellant, Clifton Clyde Reed, was charged by information, on July 22, 2002, and by amended information, on July 14, 2003, with a total of six counts of criminal nonsupport (L.F. 2, 11-12, 13-15). On August 7, 2003, a second amended information was filed that further alleged that appellant was a prior and persistent offender (L.F. 13-20). On August 21, 2003, the cause went to trial before a jury in the Butler County Circuit Court, the Honorable Mark L. Richardson presiding (Tr. 4).

Viewed in the light most favorable to the verdicts, the following evidence was adduced: Juanita Smith lived in Poplar Bluff and Butler County and engaged in a relationship with appellant (Tr. 75-76). During that relationship, they had two children, Clifton Clyde Reed, Jr., who was born on June 20, 1983, and Travis Reed, who was born on December 12, 1985 (Tr. 76).

Appellant and Smith married on February 14, 1989 (Tr. 76-77). Appellant worked at a hospital and on construction, while Smith worked at a high school (Tr. 77).

On February 14, 1995, appellant and Smith were divorced (Tr. 77). The Circuit Court of Butler County ordered appellant to pay Smith $213 per month in child support for his two children (Tr. 89). Although appellant did not show up in court on the day of the divorce, he saw Smith a lot following the divorce (Tr. 78-82).

In the years 2000-2002, Smith asked appellant for support for the children, but appellant did not give her money for the children's food, clothing, lodging, or medical attention (Tr. 79-82). He told her that he was not helping her support the children because he was not working

(Tr. 83). Sometimes, though, he gave Smith five, ten, or twenty dollars (Tr. 87-88). However, this was not enough money for her to take care of the two boys (Tr. 88).

In 2001, the Butler County Prosecutor's Office started an administrative modification proceeding of appellant's child support obligation, as was required every three years by federal law (Tr. 90-91). Appellant was served through certified mail on April 27, 2001, and he was served in person by a member of the sheriff's department on July 6, 2001, with paperwork pertaining to the proposed modification (Tr. 97-98). He did not respond in the modification proceedings, so on October 17, 2001, the judge entered a default judgment that modified appellant's child support to $106 per month for the two children (Tr. 94-95). The court's order was retroactive to June 6, 2001 (Tr. 95).

A search of records at the time of appellant's trial indicated that he had never made any child support payments to the Family Support Payment Center, as is required under current law, and that he had not made child support payments to the Circuit Court Clerk's Office, as had been required under older law (Tr. 95-96).

Appellant testified in his defense. He admitted that he was the father of Travis and Clifton, Jr. (Tr. 127). Appellant testified he knew that he was divorced, but that he had not heard that he had an obligation to pay child support until he saw documents during discovery in the case at bar (Tr. 115). When asked whether he and Smith talked numerous times about child support, appellant said:

> We haven't talked numerous times. We talked occasionally not numerous times and when we did talk it wasn't

> really talking. It was just kind of a cat and dog thing, you know, and I didn't, I don't like arguing so I just kind of end it.

(Tr. 136).

Appellant claimed that a letter to the child support office in April of 1995 that appeared to have been signed by him was not written or signed by him (Tr. 140-142). He said that he had not had a full time job since he started taking drugs about eight years earlier, and that since then he had been in and out of prison and jail (Tr. 115-117, 142-144). He claimed that he provided some support for his children (Tr. 130). He also said that he applied for disability, because he hurt his back in 1994 or 1995, but that the Social Security Office had not decided his case (Tr. 116, 134).

At the close of the evidence, instructions and argument of counsel, the jury found that appellant was guilty as charged (L.F. 49-54; Tr. 167-168). After finding appellant to be a prior and persistent offender, the trial court sentenced appellant to six concurrent terms of five years in the custody of the Department of Corrections (L.F. 60; Tr. 176).

Appellant filed a notice of appeal on October 15, 2003 (L.F. 68). On March 11, 2004, appellant filed his appellate brief, raising three points on appeal (App. Br. 12-35). In his second point, appellant claimed that the trial court erred in overruling appellant's Batson challenge to the state's using of seven of its peremptory strikes against men because the strikes were gender-motivated (App. Br. 19-26).

On July 16, 2004, the Court of Appeals, Southern District, issued an opinion, finding that the trial court clearly erred in accepting the state's explanation for striking the male jurors

because the explanation was not specific and that the trial court failed to follow the three-step process to determine whether there was purposeful discrimination, as set out in State v. Parker, 836 S.W2d 930 (Mo. banc 1992). State v. Reed, SD No. 25895 (Mo. App., S.D. July 16, 2004). The Court of Appeals remanded this case to the trial court for a hearing on appellant's gender Batson challenge. Id. The Court of Appeals held the remaining claims in abeyance. Id.

On September 29, 2004, the trial court held a hearing on appellant's Batson claim and denied it (H. Tr. 2-31). Thereafter, the Court of Appeals issued an opinion, affirming appellant's conviction and sentence. State v. Reed, SD No. 25895 (Mo. App., S.D. April 6, 2005).

Appellant sought, and this Court granted transfer. This appeal follows.

ARGUMENT

I.

The trial court did not err in overruling appellant's motion for a judgment of acquittal from the charges of criminal nonsupport, because there was sufficient evidence from which reasonable jurors could have found that appellant acted knowingly when he failed to provide support for his children.

In his first point, appellant claims that the trial court erred in overruling his motion for judgment of acquittal on Counts I through IV, criminal nonsupport of appellant's two children during years 2000 and 2001, because there was insufficient evidence that appellant knew that he had been ordered by a court to pay a monthly child support (App. Br. 15-29).[1]

Standard of Review

In reviewing a challenge to the sufficiency of the evidence, appellate review is limited to a determination of whether there is sufficient evidence from which a reasonable finder of fact might have found the defendant guilty beyond a reasonable doubt. State v. Pike, 162 S.W.3d

[1] Appellant was also convicted of two counts of criminal nonsupport for failure to provide support of his children in 2002 (Counts V and VI). He does not challenge the sufficiency of the evidence in respect to these counts (App. Br. 15-29).

464, 473 (Mo. banc 2005); State v. Dulany, 781 S.W.2d 52, 55 (Mo. banc 1989). The evidence, together with all reasonable inferences to be drawn therefrom, is viewed in the light most favorable to the verdict and evidence and inferences contrary to the verdict are ignored. State v. Pike, 162 S.W.3d at 473; State v. Feltrop, 803 S.W.2d 1, 11 (Mo. banc 1991), cert. denied, 501 U.S. 1262 (1991). It is within the province of the jury to believe all, some, or none of the witnesses' testimony in arriving at its verdict. State v. Dulany, 781 S.W.2d at 55. Appellate courts do not weigh the evidence. State v. Villa-Perez, 835 S.W.2d 897, 900 (Mo. banc 1992).

Facts

Juanita Smith and appellant had two children, Clifton Clyde Reed, Jr., born on June 20, 1983, and Travis Reed, born on December 12, 1985 (Tr. 76). On February 14, 1995, appellant and Smith divorced (Tr. 77). The Circuit Court of Butler County ordered appellant to pay Smith $213 per month in child support for his two children (Tr. 89). Appellant did not show up in court on the day that the divorce, when the child support was ordered, but he saw Smith a lot following the divorce (Tr. 78-82).

In the years 2000-2002, Smith asked appellant for support for the children, but appellant did not give her money for the children's food, clothing, lodging, or medical attention (Tr. 79-82). He told her that he was not helping her support the children because he was not working (Tr. 83). Sometimes, though, appellant gave Smith five, ten, or twenty dollars (Tr. 87-88). However, this was not enough money for her to take care of two boys (Tr. 88).

In 2001, the Butler County Prosecutor's Office started an administrative modification proceeding as to appellant's child support obligation, as was required every three years by federal law (Tr. 90-91). Appellant was served through certified mail on April 27, 2001, and he was served in person by a member of the sheriff's department on July 6, 2001, with paperwork pertaining to the proposed modification (Tr. 97-98). He did not respond in the modification proceedings, so on October 17, 2001, the judge entered a default judgment that modified appellant's child support to $106 per month (Tr. 94-95). The court's order was retroactive to June 6, 2001 (Tr. 95).

A search of records at the time of appellant's trial indicated that he had never made child support payments to the Family Support Payment Center, as is required under current law, and that he had not made child support payments to the Circuit Court Clerk's Office, as had been required under older law (Tr. 95-96).

Appellant admitted at trial that he was the father of Travis and Clifton, Jr. and that he knew that he was divorced, but claimed that he had not heard that he had an obligation to pay child support until he saw documents during discovery in the case at bar (Tr. 115, 127). Appellant admitted that he and Smith talked about a child support, but claimed that the discussions were arguments, "just kind of a cat and dog thing." (Tr. 136). Appellant stated: "I don't like arguing so I just kind of end [the discussion]." (Tr. 136).

There was a letter sent to the child support office in April of 1995 that appeared to have been signed by appellant (Tr. 140-142).

Analysis

A parent has a legal obligation to provide for his or her children, and a failure to do so without good cause is an offense under § 568.040, RSMo 2000. State v. Seller, 77 S.W.3d 2, 5 (Mo. App., W.D. 2002). "[P]roof of the relationship of parent to minor child is sufficient to establish prima facie basis for a legal obligation of support." State v. Morovitz, 867 S.W.2d 506, 508 (Mo. banc 1993). "Therefore, evidence regarding defendant's failure to make decretal support payments as well as evidence purporting to justify this failure, while not all together irrelevant, are not conclusive of the issue of the existence of a legal obligation to support." Id.

In the case at bar, the evidence showed that appellant was the father of Travis and Clifton, Jr., and he knew that he was the father of those children (Tr. 76, 127). The children's mother, Juanita Smith, asked for child support from appellant during those years, but he never provided the children with adequate support (Tr. 79-83). As is described above, § 568.040, RSMo 2000, imposes a duty to parents to support their children, State v. Morowitz, 867 S.W.2d at 508. "[P]roof of the relationship of parent to minor child is sufficient to establish prima facie basis for a legal obligation of support." State v. Morovitz, 867 S.W.2d at 508. Appellant admitted that he was the father of Travis and Clifton, Jr. (Tr. 127). Appellant's awareness of the existence of the parental relationship was sufficient to show that he had knowledge of the existence of the legal obligation to support. State v. Morovitz, 867 S.W.2d at 508.

Appellant argues that the evidence was insufficient to show that he was aware of the court order imposing on him the obligation to pay $213 child support per a month (App. Br. 28-29). However, a court order for child support is not a requisite to criminal liability. State v. Watkins, 130 S.W.3d 598, 600 (Mo. App., W.D. 2004). This is because the prosecution under Section 568.040 is not a means to enforce a dissolution decree. State v. Morovitz, 867 S.W.2d at 508; State v. Sellers, 77 S.W.3d 2, 5 (Mo. App., W.D. 2002); State v. Watkins, 130 S.W.3d at 600. As this Court stated in State v. Morovitz:

> [E]vidence regarding defendant's failure to decretal support payments as well as evidence purporting to justify this failure, while not all together irrelevant, are not conclusive of the issue of the existence of a legal obligation to support. However, proof of the relationship of parent to minor child is sufficient to establish prima facie basis for a legal obligation of support. 867 S.W.2d at 509. (Internal citations omitted).

As discussed above, the undisputed evidence showed that appellant had a legal obligation to provide support for his children. Appellant knew that he was the father of his children; thus he was aware of his obligation to support them regardless of whether he was aware of the court order for child support (Tr. 76, 127). In addition, the children's mother asked appellant for support numerous times (Tr. 79-83). This evidence was sufficient to establish that appellant knew about his obligation to support his children regardless of whether he was aware of the court order requiring him to pay child support. *See also* State v. Sellers, 77 S.W.3d at 5 ("while a child support order provides some

evidence of what is adequate support, failure of a parent to pay decretal child support is not conclusive of whether the parent violated section 568.040.1 by failing to provide adequate support.").

However, even if knowledge of the existence of a court order was required to show that appellant knowingly failed to provide child support, there was sufficient evidence in the present case from which a jury could conclude that appellant was aware of the court order for child support. Appellant admitted that he knew that he and Smith were divorced (Tr. 115). While appellant denied knowing about the court ordered child support, the jury could have disbelieved appellant's self-serving testimony and could have determined that appellant was aware that he was required to pay child support as a part of the dissolution decree. *See* State v. Dulaney, 781 S.W.2d at 55 (the jury was free to disbelieve the defendant's self-serving testimony). Furthermore, a letter that appeared to be signed by appellant was sent to the child support office in April of 1995, inquiring about appellant's support obligation (Tr. 140-142). Appellant claimed that he did not write the letter; however, the jury could have reasonably determined that appellant, whose signature appeared on the letter, was the person who wrote the letter inquiring about his child support obligation. *See* State v. Manwarren, 139 S.W.3d 267, 272 (Mo. App., S.D. 2004)(appellant's credibility as a witness is for the jury to weigh; the jury may believe all, some or none of appellant's testimony and it is not required to accept appellant's version of the events).

In addition, the evidence showed that in 2001, appellant was sent a letter from the Butler County Prosecutor's Office requesting financial information in connection to an administrative modification proceeding as required by federal law (Tr. 90-91, 97-98). On April 27, 2001, appellant was served through certified mail with modification of appellant's child support obligation, and he was also served in person by a member of the sheriff's department July 6, 2001, with paperwork pertaining to the proposed modification (Tr. 90-91, 97-98). While appellant again denied receiving any of these documents, the evidence that they were sent to appellant and served in his residence supported an inference that appellant was aware of the documents. *See* State v. French, 79 S.W.3d 896, 900 (Mo. banc 2002)(evidence that the defendant knowingly failed to provide support to his children included awareness that he was the father, that he offered money to the mother if she would not file for child support, and that the defendant was served with summons indicating that the mother initiated a paternity and child support proceeding, but that he never responded to the summons). Therefore, the evidence was sufficient to show that appellant had a legal obligation to provide child support and that he was aware of his obligation, and appellant's claim should be denied.

II.

The trial court did not abuse its discretion in overruling appellant's gender Batson challenge to the exclusion of seven male venirepersons because the prosecutor stated gender-neutral reasons for striking the veniremen and appellant failed to show that the prosecutor's reasons were pretextual.

In his second point, appellant claims that the trial court erred in denying his Batson challenge to the exclusion of male jurors (App. Br. 30-47).

Standard of Review

Parties may not use peremptory challenges against venirepersons based solely on impermissible grounds, such as gender or race. J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 143, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994); Batson v. Kentucky, 476 U.S. 79, 89, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

Missouri uses a three-part test to determine whether peremptory strikes resulted from an impermissible motive. State v. Parker, 836 S.W.2d 930 (Mo. banc 1992), cert. denied 506 U.S. 1014 (1992); State v. Barnett, 980 S.W.2d 297, 302 (Mo. banc 1998), cert. denied 525 U.S. 1161 (1999). First, the defendant must object to the state's peremptory strike by identifying the protected group to which the venireperson belongs. State v. Parker, 836 S.W.2d at 934. The prosecutor must then provide a reasonably specific, clear, race or gender-neutral explanation for the strike. Id. Once the prosecutor provides a legitimate explanation, the burden shifts to the defendant to show

that the state's explanation was pretextual and that the strike was actually motivated by the venireperson's race or gender. Id.

"The second step of this process does not demand an explanation that is persuasive, or even plausible." Purkett v. Elem, 514 U.S. 765, 115 S.Ct. 1769, 1770, 131 L.Ed.2d 834 (1995). "At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." Hernandez v. New York, 500 U.S. 352, 111 S.Ct. 1859, 1866, 114 L.Ed.2d 395 (1991). It is not until this third step of the analysis when the persuasiveness of the justification becomes relevant, the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination. State v. Ashley, 940 S.W.2d 927, 931 (Mo. App., W.D. 1997). The burden of persuasion regarding racial or gender motivation exists with, and never shifts from, the opponent of the strike. Kelley v. State, 24 S.W.3d 228, 235 (Mo. App., S.D. 2000).

Facts

The trial record shows that the prosecutor used seven peremptory challenges against males (Tr. 65). Appellant's counsel objected on the ground that the prosecutor's strikes were based on gender (Tr. 65). The prosecutor responded:

> To tell the you the truth, Judge, I didn't know. I didn't even know I struck all males. I really don't know. I just struck them, some based on age and some of them based on some of their occupations and the way they

either spoke in the courtroom or that they didn't speak and their body language. To be honest with the Court I never knew I struck all seven and they were all males.

(Tr. 65).

The trial court asked if appellant's counsel wanted to respond to what the prosecutor said (Tr. 65-66). Appellant's counsel stated, "No, Your Honor, we still object just that it's all male jurors and they were struck" (Tr. 66). The trial court then overruled appellant's objection (Tr. 66).

Appellant raised this claim in his first direct appeal, and the Court of Appeals found that the trial court erred in accepting the prosecutor's non-specific explanation for the strikes, thus failing to apply the second prong of the Parker test, and remanded this case for a hearing on appellant's Batson challenge. State v. Reed, SD No. 25895 (Mo. App., S.D. 2004).

The trial court held a hearing on appellant's Batson claim (H. Tr. 2-31). At the hearing, the court stated that the ultimate make-up of the jury was ten women and two men, and allowed the prosecutor to explain the reasons for his strikes (H. Tr. 6).

The prosecutor explained that he had a system for selecting the jury (H. Tr. 7). He stated that when he received the jury list, he placed a "+," a "-" or a "?" by the names of the prospective jurors depending on their occupation and the type of case he was trying (H. Tr. 7). The prosecutor stated that he put similar marks on the list when he saw the prospective jurors in person and evaluated their appearances and demeanor (H. Tr. 7-8).

The prosecutor stated that with this system in mind, he struck Juror No. 12, David Burk, because this was a criminal non-support case, Mr. Burk was self-employed, and in the prosecutor's experience, self-employed people tended to hide their income (H. Tr. 8). The prosecutor also explained that Mr. Burk was middle-aged and that the prosecutor believed that people born in the 1960s and 1970s did not share the traditional values of supporting a family (H. Tr. 9).

The prosecutor explained that he struck Juror No. 19, Carl Jenkins, for the same reason as Mr. Burk, namely that he was self-employed and middle-aged (H. Tr. 8-9). The prosecutor explained that there was a third self-employed man on the jury, Lloyd Fennell, whom the prosecutor did not strike, because Mr. Fennell was born in 1934, lived through the depression and World War II, and the prosecutor believed that Mr. Fennell had the traditional beliefs that people must support their families (H. Tr. 9).

The prosecutor stated that he struck Juror No. 14, Jerry Honeycutt, because Mr. Honeycutt did not say anything, he was single and young, and the prosecutor put a question mark when he saw him in person (H. Tr. 10).

The prosecutor explained that he struck Juror No. 22, Bill Penrod, because he worked as a maintenance man for Poplar Bluff Housing Unit, and the prosecutor's main witness lived in the Poplar Bluff Public Housing and received state benefits (H. Tr. 11). The prosecutor believed that Mr. Penrod may dislike individuals who have been on welfare for many years, and this was the reason for striking Mr. Penrod (H. Tr. 11).

The prosecutor stated that he struck Juror No. 25, Albert Morrow, because of his appearance (H. Tr. 11-12). The prosecutor explained that he put two question marks on the list when he saw Mr. Morrow and struck him on the basis of his appearance (H. Tr. 12).

The prosecutor explained that he struck Sammy Way because he was a plumber, a younger individual, and the prosecutor wanted more traditional-type people on the jury (H. Tr. 12).

As for Juror No. 30, Jimmy Wilson, the prosecutor explained that he struck Mr. Wilson because he made a "?" or a "-" on both of his lists, and because Mr. Wilson was the last person on the jury list (H. Tr. 12). The court then explained that Mr. Wilson was the last available person for the parties to strike from the venire list (H. Tr. 12-16).

The court asked the prosecutor why he did not strike any women (H. Tr. 17). The prosecutor explained that he had question marks by the names of Juror No. 17, Cleah Bradley, and Juror No. 27, Melissa Wells, on the initial jury list. The prosecutor explained that he had put a question mark by the name of Cleah Bradley because she worked at Three Rivers Health Care, but when the prosecutor saw Ms. Bradley in person, he determined that she would be an acceptable juror (H. Tr. 18).

The prosecutor further stated that he had a question mark by the name of Melissa Wells because she indicated in the jury questionnaire that she was an insurance agent and the prosecutor could not tell whether she was self-employed or worked for a company (H. Tr. 18). The prosecutor stated that once he saw Ms. Wells's appearance

and demeanor, he determined that she would be a good juror (H. Tr. 18).

The prosecutor stated again that he was completely unaware that he struck only men until the defense attorney made a gender-based Batson objection at trial (H. Tr. 6-7, 26).

The defense attorney responded that Melissa Wells and Albert Morrow were similarly situated because they were of the same age (H. Tr. 22). The defense attorney stated further that the state struck all male jurors who did not speak (H. Tr. 22). She noted that there were no questions directed to Juror No. 14, Jerry Honeycutt (H. Tr. 22). The defense attorney argued that there were four female jurors who did not speak, Juror No.1, Tona Arnold, Juror No. 2, Patricia Baker, Juror No. 27, Melissa Wells, and Juror No. 4, Tina Crow (H. Tr. 22-23). The defense attorney acknowledged that Ms. Crow was ultimately struck by the defense, but argued that she was similarly situated with Albert Morrow because she was of similar age (H. Tr. 23).

The defense attorney stated that Albert Morrow, Tona Arnold and Patricia Baker had "office type jobs." (H. Tr. 23-24). The court disagreed with the characterization of Mr. Morrow's employment (H. Tr. 24). The court stated that Mr. Morrow was an order clerk for a wholesale company and that he had a "retail clerk's job." (H. Tr. 24).

The court asked the prosecutor to respond to the defense attorney's argument (H. Tr. 26).

The prosecutor stated that Ms. Wells and Mr. Morrow were not similarly situated because, although the prosecutor initially questioned Ms. Wells due to her employment,

her appearance eliminated his concerns and he took away the question mark that he had put by her name (H. Tr. 27).

He distinguished Patricia Baker and David Burk on the basis that Mr. Burk was self-employed and because this was a criminal non-support case, he believed that Mr. Burk would not be a good juror (H. Tr. 28).

As to Tina Crow, the prosecutor explained that he did not strike her because she knew the elected prosecutor, Kevin Barbour, and he believed that this fact was favorable to the prosecution (H. Tr. 28, Tr. 28-29).[2]

The defense attorney repeated that Ms. Crow did not say anything during *voir dire* (H. Tr. 29).[3]

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[2] Ms. Crow indicated that this fact would not cause her to be unfair in this case (Tr. 28).

[3] The trial transcript shows that Ms. Crow did in fact make statements during *voir dire*. She indicated that she knew Kevin Barbour socially and that this fact would not

The court took the case under advisement (H. Tr. 30). Subsequently, the court issued the following findings:

> Now, on this 20th day of October, 2004, the Court, having been fully advised, finds that the State has provided reasonably specific and clear explanations that its peremptory strikes were gender-neutral. Therefore, the Court finds that Defendant's prima facie case is rebutted.
>
> The Court further finds Defendant failed to convince the Court that the State's explanations were merely pretextual or that the true motivation for the strikes was gender based.
>
> Now, therefore, the Court finds that the State did not use its peremptory strikes in a discriminatory manner, and that Defendant's objections are overruled. Trial court clerk is ordered to forward these findings to the clerk of the Appellate Court together with trial court's Exhibit 1 [jury questionnaire], and to provide counsel for both parties with a copy of trial court's findings.

(Sec. Supp. L.F. 36).

Analysis

The trial court's determination regarding purposeful discrimination is a finding of

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interfere with her ability to be fair and impartial (Tr. 28-29).

fact that will not be overturned on appeal unless clearly erroneous. State v. Taylor, 18 S.W.3d 366, 370 (Mo. banc 2000), cert. denied, 531 U.S. 901 (2000); State v. Hall, 955 S.W.2d 198, 205 (Mo. banc 1997). Deference to trial court findings on the issue of discriminatory intent makes particular sense, because the finding will largely turn on evaluation of credibility and the best evidence will often be the demeanor of the attorney who exercises the challenge. Hernandez v. New York, 500 U.S. at 364 (1991). "The credibility of the prosecutor's explanation goes to the heart of the equal protection analysis, and once that is settled, there seems nothing left to review." Id. at 367. "The justification for a peremptory strike need not rise to the level of a justification for a challenge for cause." State v. Hall, 955 S.W.2d 198, 205 (Mo. banc 1997), cert. denied 523 U.S. 1053 (1998).

The prosecutor in the present case gave a gender-neutral explanation for his strikes. He struck David Burk and Carl Jenkins because they were middle-aged and self-employed (H. Tr. 9-10). The prosecutor struck Jerry Honeycutt because he was single and young, and because the prosecutor questioned his appearance (H. Tr. 10). The prosecutor struck Bill Penrod because he worked for Poplar Bluff Housing Unit, and the prosecutor's main witness lived in the Poplar Bluff Public Housing and was receiving state benefits (H. Tr. 11). The prosecutor struck Albert Morrow because of his appearance (H. Tr. 11-12). He struck Sammy Way because he was a plumber and a younger individual, and the prosecutor wanted more traditional type people on the jury (H. Tr. 12). Lastly, the prosecutor struck Jimmy Wilson because the prosecutor

questioned his appearance and because Mr. Wilson was the last person on the jury list (H. Tr. 12).

The prosecutor's explanations were gender-neutral and were sufficient to shift the burden to appellant to establish that they were pretextual. *See* State v. Deck, 994 S.W.2d 527, 537 (Mo. banc 1999)(the prosecutor's explanation that the stricken juror would be a "weak juror" was facially non-discriminatory explanation); State v. Brown, 998 S.W.2d 531, 544 (Mo. banc 1999)(a juror's employment is a legitimate, race-neutral reason for striking a juror); State v. Link, 965 S.W.3d 906, 910 (Mo. App., S.D. 1998)(striking an alternate juror because he is the first on the list and any alternate is acceptable to the state, was a gender-neutral reason); and State v. Norton, 904 S.W.2d 265, 270 (Mo. App., W.D. 1995)(the jurors' conduct and appearance are sufficient race-neutral justification for a strike).

Appellant claimed that Melissa Wells and Tina Crow were similarly situated to Albert Morrow because they were of the same age (H. Tr. 22, 23). The prosecutor responded that he questioned Ms. Wells initially because she was an insurance agent, but eliminated his concerns based on his personal observations of her appearance (H. Tr. 18, 27). What a prosecutor observes during *voir dire* about a potential juror, as well as what is said, may form a legitimate non-discriminatory basis for exercising a peremptory challenge. State v. Weaver 912 S.W.2d 499, 509 (Mo. banc 1995), cert. denied 519 U.S. 856 (1996); State v. Link, 965 S.W.3d at 910. The trial court has the best opportunity to observe the juror sought to be stricken, to listen to his or her

responses, and to assess the prosecutor's demeanor and reasoning for striking the juror. State v. Weaver 912 S.W.2d at 509. The trial court in the present case credited the prosecutor's explanation, and appellant cannot show that he met his burden of showing that the prosecutor's explanation was pretextual (Sec. Supp. L.F. 36).

The prosecutor further explained that Albert Morrow and Tina Crow were not similarly situated because Ms. Crow knew the elected prosecutor, Kevin Barbour, and the prosecutor believed that this was favorable to the state (H. Tr. 28). In addition, appellant acknowledged that Ms. Crow was stricken by him, and he cannot show that she was a similarly situated female juror who remained on the jury.

The defense attorney argued that the state struck all male jurors who did not speak during *voir dire*, but that the state did not ask Jerry Honeycutt any questions (H. Tr. 22-23). The defense attorney argued that there were four female jurors who did not speak, Tona Arnold, Patricia Baker, Melissa Wells, and Tina Crow, but that they were not struck by the state (H. Tr. 22-23).

The prosecutor, however, provided additional gender-neutral explanations for striking the male jurors besides the fact that they did not speak (H. Tr. 9-13). These reasons included employment, age, appearance, and demeanor (H. Tr. 9-13). The prosecutor struck only Jerry Honeycutt because he did not say anything (H. Tr. 10). In regards to Mr. Honeycutt, the prosecutor provided an additional explanation for striking him besides the fact that he did not speak. The prosecutor struck Mr. Honeycutt because he was single and young, and because the prosecutor questioned his

demeanor when he saw him in person (H. Tr. 10). Appellant did not point to any single female of the same age as Mr. Honeycutt who remained on the jury, and he cannot show that the prosecutor's gender-neutral explanation was pretextual.

As to the defense attorney's argument that Albert Morrow, Tona Arnold and Patricia Baker all had "office type jobs," the trial court disagreed, stating that Mr. Morrow had a "retail clerk's job." (H. Tr. 23-24). In light of the trial court's finding that these jurors were not similarly situated, appellant cannot show that he met his burden of showing that the prosecutor's gender-neutral explanation was pretextual.

For the first time on appeal, appellant argues that Angelia Croy and Melissa Wells were similarly situated to David Burk and Carl Jenkins because they were self-employed and of the same age (App. Br. 41). Appellant did not raise this claim before the trial court. At the hearing on appellant's Batson challenge, appellant did not point to any females who were self-employed and were not stricken by the prosecutor and did not argue that Angelia Croy and Melissa Wells were of the same age as David Burk and Carl Jenkins (H. Tr. 19-25, 29-31). Appellant may not bring a new justification on appeal to support a finding of pretext in the state's gender-neutral explanation for its strikes. State v. Koenig, 115 S.W.3d 408, 414 (Mo. App., S.D. 2004); State v. Bass, 81 S.W.3d 595, 611 (Mo. App., W.D. 2002). Because appellant failed to raise this claim before the trial court, his claim is waived and should not be reviewed. State v. Koenig, 115 S.W.3d at 414.

In any event, appellant cannot show that Angelia Croy was similarly situated to

David Burk and Carl Jenkins. Ms. Croy indicated that she knew Wade Pearce, who was an assistant prosecuting attorney (Tr. 31-32). Ms. Croy stated during *voir dire* that her relationship with Mr. Pearce would not interfere with her ability to be fair and impartial (Tr. 31-32). While the prosecutor was not asked before the trial court to explain why he did not strike Ms. Croy, it is clear that the prosecutor wanted on the jury people who were familiar with the prosecutor's office, as the prosecutor explained that he wanted Tina Crow on the jury because she knew the elected prosecutor (H. Tr. 28). Accordingly, appellant cannot show that Angelia Croy was similarly situated to David Burk and Carl Jenkins.

Furthermore, the record does not support appellant's assertion that Melissa Wells was similarly situated to David Burk and Carl Jenkins. The jury questionnaire does not show that Ms. Wells was a self-employed woman whom the prosecutor did not strike, as appellant argues, but shows that Ms. Wells worked as an insurance agent for Capitol Insurance (Sec. Supp. L.F. 28; H. Tr. 18). To the extent that the record is unclear whether Ms. Wells was employed by an insurance agency or could have been self-employed, it must be noted that the prosecutor did consider striking Ms. Wells on the basis that she might be self-employed (H. Tr. 18). The prosecutor stated that he put a question mark by Ms. Wells' name when he saw the jury questionnaire because he thought that Ms. Wells could be self-employed, but that he determined that Ms. Wells would be a good juror after seeing her appearance and demeanor (H. Tr. 18, 27). The fact that the prosecutor had considered striking a self-employed woman was a factor that

the trial court could properly consider in determining that the prosecutor's explanation for striking David Burk and Carl Jenkins as self-employed men was not gender-motivated. *See* State v. Miller, 162 S.W.3d 7, 14 (Mo. App., E.D. 2005)(whether similarly situated jurors from another race were not struck is a factor to be considered in determining pretext).

In addition, the record does not support appellant's contention that the prosecutor used self-employment as a pretext to strike all men from the jury because the prosecutor did not strike Lloyd Fennell, who was a self-employed man (H. Tr. 9). The prosecutor's failure to strike Mr. Fennell shows that the prosecutor did not randomly strike all men in an effort to eliminate all men from the jury. *See* State v. Edwards, 116 S.W.3d 511, 528 (Mo. banc 2003), cert denied 540 U.S. 1186 (2004)(the prosecutor struck three postal workers, but did not strike all jurors who worked for bureaucracies).

Appellant argues that the prosecutor's symbol system was subjective and that the prosecutor did not provide an explanation how the use of symbols related to the facts at the case at bar (App. Br. 44-45). Showing of logical relevance between the stated reason for striking a juror and the facts of the case is only one factor that the court examines in the totality of the circumstances to determine whether the strike was gender-motivated. State v. Edwards, 116 S.W.3d at 528. Other factors to be considered in determining whether proffered reasons are merely pretextual for purposeful discrimination include a determination of whether similarly situated jurors were struck, the plausibility of the prosecutor's explanation for the strike, the degree of logical relevance

between the proffered explanation and the case to be tried, the prosecutor's credibility based on the prosecutor's demeanor and statements during *voir dire*, the demeanor of the excluded venirepersons, and the court's prior experience with the prosecutor. State v. Marlowe, 89 S.W.3d 464, 470 (Mo. banc 2002); State v. Edwards, 116 S.W.3d at 528.

The prosecutor in the present case struck the jurors based on their occupation, age, and demeanor (H. Tr. 7-12, 22-27). The prosecutor explained the logical relevance of these factors to the case at bar. The prosecutor stated that this was a criminal nonsupport case, that he wanted more traditional people on the jury who believed in supporting their family and that he did not want self-employed people because they tended to hide their income (H. Tr. 7-9, 18). The prosecutor used the symbol system to place a "+,"a "-" or a "?" by the names of the prospective jurors based on their occupation and the type of case he was trying (H. Tr. 7-8). The trial court credited the prosecutor's explanation for striking self-employed people and the reasoning was sufficient to show lack of pretext for the strikes. *See* State v. Edwards, 116 S.W.3d at 528 (the prosecutor's explanation that he struck postal workers because of the prosecutor's prior negative experience with the postal workers and the prosecutor's belief that postal workers were not good jurors was properly weighed by the trial court in finding no pretext of the prosecutor's strikes).

To the extent that the prosecutor used a similar symbol system to indicate the jurors' appearance and relied on it to explain the basis for his strikes at the hearing on appellant's Batson challenge, which was held a year after the trial, the trial court was in

the best position to determine the credibility of the prosecutor's explanation (Tr. 4, H. Tr. 2-31). As this Court stated in State v. Antwine, 743 S.W.2d 51 (Mo. banc 1988):

> *Batson* recognizes the subjective nature of peremptory challenges and permits their continued use in criminal proceedings. At the same time, *Batson* strictly prohibits the use of peremptory challenges in a racially discriminatory manner. Therefore, we read *Batson* to require the trial judge to assess the entire milieu of the voir dire objectively and subjectively. The judge must consider his personal, lifetime experiences with voir dire, comparing his observations and assessments of veniremen with those explained by the State. In addition, he must consider both his personal experiences with the prosecutor and any evidence offered by a defendant to show a pattern or practice of a prosecutor using peremptory challenges in a racially discriminatory manner over the course of time. Other factors must be considered as circumstances demand.

743 S.W.2d at 65-66.

The trial court in the present case was in the best position to evaluate the prosecutor's explanation for striking the jurors based on their appearance and demeanor. The trial judge observed the jurors' and the prosecutor's demeanor during *voir dire* and was in the best position to judge the credibility of the prosecutor's explanation at the hearing on appellant's Batson claim. The trial court determined that the prosecutor's strike of jurors on the basis of their appearance and demeanor was gender-neutral, and appellant cannot show that the court

abused its discretion in considering this factor in upholding the strikes. *See also* State v. Taylor 18 S.W.3d 366, 375 (Mo. banc 2000)("In the present case we recognize the superior vantage point occupied by the trial judge. He was able to view the panel members; listen to their responses; analyze and supervise the statements and questions made by the prosecutor during voir dire; and evaluate the reasons the prosecutor offered for exercising the peremptory challenges as he did.").

Appellant relies on State v. Hopkins, 140 S.W.3d 143 (Mo. App., E.D. 2004), to argue that the prosecutor's explanation for striking self-employed people as tending to hide their income and for wanting people with traditional views was pretextual because the prosecutor did not question the jury about their beliefs regarding the family support (App. Br. 40-41). Hopkins is distinguishable. In Hopkins, the prosecutor struck an African-American venireperson because of her employment in the financial area. 140 S.W.3d at 149-150. The prosecutor explained that he struck the venireperson because she dealt with "things that add up," and because the evidence was circumstantial and may not "add up to her." Id. The Court of Appeals, Eastern District, held that the prosecutor's reasoning was pretextual because the prosecutor did not strike a white venireperson who was a collector, because the case was not circumstantial, but based on eyewitnesses' testimony, and because the prosecutor failed to ask the remaining venirepersons whether their employment involved "adding things up." Id. at 150. The court examined the totality of the circumstances in the case, including the prosecutor's attempt to strike other minority jurors, and concluded that the prosecutor's behavior was inconsistent with his stated reasoning for striking African-American jurors. 140 S.W.3d at150.

Unlike in Hopkins, the record in the present case does not support a conclusion that the prosecutor intentionally discriminated against men. The prosecutor did not use self-employment as a pretext for striking only men because the prosecutor did not strike a self-employed man, Lloyd Fennell, and the prosecutor considered striking a self-employed woman (H. Tr. 9, 19-25, 29-31). The trial court considered prosecutor's gender-neutral reasoning for striking the jurors, which included the jurors' age, occupation, and demeanor, in the totality of the circumstances and weighed the relevance of the stated factors to the case at bar (H. Tr. 7-9, 12). The trial court also made a credibility determination of the prosecutor's explanation and found that appellant failed to convince the court that the prosecutor's proffered reasons for striking the male venirepersons were pretextual (Sec. Supp. L.F. 36). Because the prosecutor provided gender-neutral reasons for exercising his peremptory strikes, and appellant failed to show that the prosecutor's reasons were pretextual, the trial court did not err in denying appellant's gender Batson challenge to the state's peremptory strikes. Therefore, appellant's claim should be denied.

CONCLUSION

In light of the foregoing, respondent submits that appellant's convictions and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 8,068 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 10th day of August, 2005, to:

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RESPONDENT'S APPENDIX